Browning-Ferris Industries of California, Inc. *and* Sanitary Truck Drivers & Helpers, Local 350, AFL–CIO, Petitioner. Case 20–RC–17283

February 19, 1999

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on May 8, 1998, and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 104 votes for and 175 against the Petitioner, with 2 challenged ballots, a number insufficient to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has adopted the Acting Regional Director's findings[1] and recommendations, and finds that the election must be set aside and a new election held.

We agree with the Acting Regional Director, for the reasons stated in his report, that Union Objection 1 must be sustained because of actions by the Region which had the effect of denying the Union its right to have observers at the election. As the Regional Director correctly noted, the Board has long held that the breach of a provision in an election agreement providing for an equal number of observers is a material breach which warrants setting aside the election. *Breman Steel Co.*, 115 NLRB 247 (1956). The stipulated election agreement in this case clearly provided for each party to have an equal number of observers. However, the Board agent allowed the election to proceed with two observers present for the Employer and no observers present for the union. This constituted a material breach of the agreement such that the election must be set aside.

Unlike our dissenting colleague, we would not excuse the Board agent's decision to conduct the election without any union observers on the ground that the Petitioner was proposing to use as its observers individuals who were no longer current employees of the Employer. As an initial matter, we note that the election agreement by its terms requires only that the observers be "nonsupervisory employees"; it does not state that they must be employees of the Employer. However, even if the parties interpreted the agreement to include the latter requirement, as the Acting Regional Director indicated, our view that it does not justify the Board agent's decision would be the same.

The Board has held that breach of a requirement that observers be employees *of the employer* is not a material breach and is therefore not per se objectionable. *Kelley & Hueber*, 309 NLRB 578, 579 (1992). On the other hand, the breach of an election agreement provision requiring equal numbers of observers *is* a material breach which will result in setting aside the election without the need for a showing of prejudice. As the Ninth Circuit has noted, parties to Board elections rely on their observers to "carry out the important functions of challenging voters and generally monitoring the election process." *NLRB v. Frontier Hotel*, 625 F.2d 293, 295 (9th Cir. 1980). By their presence, observers help to assure the parties and the employees that the election is being conducted fairly. When one party has observers and the other does not, or there is an imbalance in the number of observers, there is "a significant risk that an imbalance in the number of observers, with the acquiescence of the Board agent, could create an impression of predominance on the part of [one party] and partiality on the part of the Board." Id. In contrast, there is nothing inherent in the fact that a party's observer is not an employee of the employer that would tend to call into question the integrity of the election process. *Embassy Suites Hotel*, 313 NLRB 302 (1993). Thus the Board, in evaluating objections based on the alleged breach of an election agreement by use of an observer who was not a current employee of the Employer, has not regarded such a breach as automatic grounds for setting aside the election, but rather has looked to whether the party's use of the observer was "reasonable under the circumstances." *Kelley & Hueber*, supra, footnote 7.

Here the Petitioner notified the Region the day before the election that it had been unable to obtain the agreement of any current employee to act as its observer, and that it was therefore proposing to use as observers two former employees of the employer now employed elsewhere. At that point, the appropriate course of action would have been for the Board agent conducting the election to advise the parties of the potential adverse consequences of using the former employees as observers under applicable case law, i.e., that if the Employer filed objections to the election on the basis that the Petitioner's observers were not employees of the Employer, and it was determined that use of the former employees was not reasonable under the circumstances presented, the election could be set aside. With the Petitioner thus forewarned, the Board agent should have allowed the election to proceed with the observers chosen by the parties, leaving to the objections process the resolution of any issues that might be raised as to the reasonableness of the Petitioner's actions. Instead, the Board agent caused the election to proceed with no observers for the Petitioner—a material breach of the election agreement requiring that the election be set aside.

[1] In the absence of exceptions, we adopt pro forma the Acting Regional Director's recommendation that Union Objections 2, 3, and 4 be overruled.

We correct the Recommendation section of the Acting Regional Director's report, where he mistakenly attributed the objections to the Employer rather than to the Union.

Contrary to the dissent, we do not agree that the actions of the Board agent were effectively dictated by the statement in Section 11310 of the Board's Casehandling Manual that "observers must be nonsupervisory employees of the employer." As the Board explained in *Embassy Suites Hotel*, supra, this section of the manual is aimed at preventing intimidation that might take place should a party choose to have a supervisory employee present as its observer, not at preventing the use of former employees as observers. Moreover, the provision goes on to state that "[i]f a claim is made that an observer is ineligible to act, the matter should be discussed and the parties made aware that the use of an ineligible observer *may result in the election being set aside."* (Emphasis added.) In other words, the procedure to be followed in the event that a party proposes to use an observer who is alleged to be ineligible is not to prohibit the party from using the observer, but rather, as we have stated, to put the parties on notice that the use of the ineligible observer may later result in the setting aside of the election results, and to allow the election to proceed with that understanding.

MEMBER HURTGEN, dissenting.

I do not agree that the election must be set aside. In my view, the Board agent did not abuse his discretion by denying the Union's request to use nonemployee observers at the election.

My colleagues set aside the election because the Union had no observers at the election. The evidence shows that the Union requested permission to use nonemployee observers at the election. The Union claimed that: (1) the Employer had intimidated employees; (2) because of this, no employee would consent to be a union observer. Because of the absence of a hearing, there is no evidence to establish either proposition.[1]

The Employer objected to the Union's use of nonemployees as observers. The Board agent told the Union that its request was denied. Clearly, the denial was in accord with Manual Section 11310. That section provides that "observers must be nonsupervisory employees of the employer, unless a written agreement by the parties provides otherwise." I would not say that the Board agent abused his discretion *by following the Manual*.

As discussed, the use of nonemployee observers would have been contrary to the Manual. However, my colleagues assert that such use would have been consistent *with the election agreement*. In this regard, my colleagues note that the agreement said only that observers must be employees; it did not expressly say that observers had to be employees "of the employer." However, as my colleagues acknowledge, the Acting Regional Director found that the parties understood that the term "employees" meant "employees of the employer." The Acting Director noted that the Manual provision, under which the agreement was executed, clearly stated that observers must be employees of the employer. Accordingly, the Board agent was clearly reasonable in interpreting the agreement as requiring that observers be employees of the employer.

Further, the election agreement provided that each party "may" have observers. In the instant case, the Union was given this opportunity. In the absence of a hearing, it cannot be said that Employer conduct or other circumstances took away that opportunity.

My colleagues assert that the Board agent should have explained to the Union that its use of nonemployee observers could result in the setting aside of the election. However, that message was clearly implicit in what the Board agent said. The Board agent, consistent with the Manual, said that the use of nonemployees as observers was not permitted. Any reasonable person, upon hearing this, would understand that use of nonemployee observers could preclude the holding of a valid election.

On a related point, my colleagues suggest that the Board agent should have given the Union the option of holding the election with the use of nonemployee observers, with the attendant risk that this might invalidate the election. However, the Board agent was operating under a Manual provision which said that observers "must" be employees of the employer. Thus, it was not unreasonable for the Board agent to refuse to run the election with nonemployee observers.

Finally, the majority relies on *NLRB v. Frontier Hotel,* 625 F.2d 293 (9th Cir. 1980). The case is clearly distinguishable. In that case, the Board agent permitted the union to have extra observers, i.e., more than those allowed the employer. The Board agent acted without any justification and without consultation with the employer. By contrast, the Board agent in the instant case consulted with both parties, and was willing to allow the union to have an equal number of observers, provided that the "employee of the employer" requirement was met.

[Direction of Second Election omitted from publication.]

[1] The Union secured the votes of 104 employees in the election. It is not self-evident that the Union was unable, after exercising due diligence, to persuade any of these employees to be an observer.